



- (1) What is the nature and extent of claimant's injury and/or disability?
- (2) Are respondent and its insurance carrier entitled to a credit for an overpayment of temporary total disability benefits paid at the Missouri compensation rate?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

#### **FINDINGS OF FACT**

Claimant suffered accidental injury arising out of and in the course of his employment with respondent on November 15, 1995. Claimant was pulling a loaded dolly of milk up the steps to the Pittsburg Middle School when he experienced a sudden pain in his low back with radiculopathy into his legs. He finished making his deliveries that day and reported the accident to Don Randolph, his supervisor. He was referred to the company doctor, Dr. William Kessler, and was ultimately referred to Dr. Laurie L. Behm, a physical medicine specialist. Claimant underwent conservative care with Dr. Behm, including a CAT scan myelogram which pinpointed a slight herniation at L5-S1 on the right side. Claimant was referred for physical therapy, traction and other treatment modalities, and progressed well. The final diagnosis was an L5-S1 disc herniation with residual back pain. Claimant was not considered to be a surgical candidate by either Dr. M. Ellen Nichols or Dr. Jeffrey Greenberg, both neurosurgeons.

Dr. Behm found claimant was at maximum medical improvement on September 16, 1996, and assessed him a 3 percent functional impairment based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. Claimant was restricted to lifting 40 pounds maximum.

Dr. Behm was presented a task list prepared by vocational rehabilitation expert Denise Reilly. In reviewing that task list, Dr. Behm found that claimant lost 10 percent of his ability to perform those prior tasks. Dr. Behm was also provided a copy of the task list prepared by Karen Sherwood, claimant's vocational expert. In reviewing that task list she found claimant lost 25 percent of his ability to perform those tasks.

Claimant was also referred for an evaluation to Dr. Edward J. Prostic by claimant's attorney. Dr. Prostic examined claimant on September 30, 1997, and diagnosed a

herniated disc at L5-S1. Dr. Prostic recommended claimant avoid lifting weights greater than 50 pounds occasionally or 25 pounds repetitively, and also avoid repeated forceful pushing or pulling or bending or twisting at the waist. He also recommended claimant avoid the use of vibratory equipment. Claimant was assessed a 15 percent whole body functional impairment as a result of the injuries suffered to his low back. When asked to consider the task list presented by claimant's attorney, Dr. Prostic found claimant suffered a 50 percent loss of his ability to perform his prior job tasks.

The Administrative Law Judge, in considering the opinions of the physicians, rejected Dr. Behm's opinion, finding that she was unable to explain her 3 percent whole body functional rating pursuant to the AMA Guides, Fourth Edition. The Appeals Board acknowledges Dr. Behm did appear somewhat confused and had difficulty explaining the functional impairment. However, with regard to the restrictions she placed on claimant and the task analysis provided by Dr. Behm, the Appeals Board found no confusion in the doctor's testimony and will not reject the doctor's opinion for the purpose of assessing claimant a work disability in this matter.

Respondent provided videotape evidence and testimony regarding claimant's physical activities outside of his employment. Claimant was observed bowling for a two- to three-hour period without exhibiting pain behavior, was able to go deer hunting once or twice a week, and would spend up to eight to nine hours at a time fishing. Respondent argues that this evidence clearly damages claimant's credibility as he exhibits physical range of motion abilities which exceed those observed by Dr. Prostic and testified to in his deposition. However, when asked about the videotape, Dr. Prostic opined that he would not strictly prohibit claimant from bowling, but would advise him that he could expect to be sore afterwards.

Claimant testified at both his deposition and at the regular hearing about his efforts to find employment. While claimant discussed several attempts to obtain employment, he also verified that he was not willing to accept a job if it were not something that he wanted to do. The Administrative Law Judge in the Award imputed a wage to claimant resulting in a 77 percent loss of wage earning capabilities based upon a \$6.50 per hour wage and a 40-hour week.

#### CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, it is claimant's burden to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 1995 Supp. 508(g). In this instance, the Appeals Board considers the opinion of Dr. Behm and the opinion of Dr. Prostic regarding claimant's loss of task performing abilities to be equally credible. In considering both, the Appeals Board finds claimant has suffered a 34 percent loss of task performing abilities.

With regard to claimant's post-injury efforts to obtain employment, the Appeals Board is disturbed by claimant's limited job search efforts. Claimant rationalized that if it is a job that he hated, there would be no sense in doing it because he would not do it very long anyhow. In considering the policies set forth in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), the Appeals Board finds that claimant's job search does not constitute a good faith effort to obtain post-injury employment. Therefore, the Administrative Law Judge's decision to impute a wage to claimant at \$6.50 per hour for a 40-hour week is appropriate. However, \$6.50 an hour times 40 hours a week computes to \$260, rather than \$240 as indicated in the Award. This would compute to a wage loss of 75 percent.

When comparing claimant's 75 percent wage loss to the 34 percent loss of task performing abilities, the Appeals Board finds claimant has suffered a work disability of 54.5 percent for the injuries suffered on November 15, 1995.

During the litigation of this matter, claimant was paid weekly benefits at the Missouri temporary total rate of \$491.19 per week. This is higher than the appropriate Kansas maximum rate of \$326 per week applicable for a November 15, 1995, date of accident. Respondent will be given credit for all payments made.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated February 5, 1999, should be, and is hereby, modified, and an award is granted in favor of the claimant, Marvin W. Jenkins, and against the respondent, Hiland Dairy, and its insurance carrier, Old Republic Insurance Company, for a 54.5 percent permanent partial disability to the body as a whole for the injuries suffered on November 15, 1995, and based upon an average weekly wage of \$1,053.18.

Claimant is entitled to 43.57 weeks of temporary total disability compensation at the appropriate rate of \$326 per week totaling \$14,203.82, followed by 210.60 weeks of permanent partial disability compensation at the rate of \$326 per week totaling \$68,655.60, for a total award of \$82,859.42.

As of October 6, 1999, claimant is entitled to 43.57 weeks of temporary total disability compensation at the rate of \$326 per week totaling \$14,203.82, followed by 159.43 weeks of permanent partial disability compensation at the rate of \$326 per week totaling \$51,974.18, for a total due and owing of \$66,178.00. Thereafter, claimant is entitled to 51.17 weeks permanent partial disability compensation at the rate of \$326 per week in the amount of \$16,681.42 until fully paid or until further order of the Director.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Hostetler & Associates, Inc.	\$678.15
Deposition of Marvin W. Jenkins	
Deposition of Edward J. Prostic, M.D.	
Deposition of Karen Sherwood	
 Martin D. Delmont, C.S.R.	 \$188.00
Regular Hearing	
 Bowen Motter Reporting	 \$358.80
Deposition of Denise M. Reilly	
 Karpowicz Reporting Company	 \$ 89.00
Deposition of Robert Thies	
 Freeman and Associates	 \$328.25
Deposition of Laurie L. Behm, M.D.	

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1999.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

**DISSENT**

I would affirm the Judge's decision. I agree with the Judge that Dr. Behm lacks credibility for the numerous reasons set forth in the Award. The doctor's testimony absolutely lacks all credibility as it raises grave concerns regarding her motivation.

---

BOARD MEMBER

c: William L. Phalen, Pittsburg, KS  
Clinton D. Collier, Kansas City, MO  
Steven J. Howard, Administrative Law Judge  
Philip S. Harness, Director